Supreme Court, U. S.
FILED
OCT 21 1976
MICHAEL RODAK, JR., CLERK

76-562

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

R. C. ROBERTS,
Petitioner,

vs.

AMERICAN BANK OF MUSKOGEE and HARTFORD ACCIDENT AND INDEMNITY COMPANY, A Corporation,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

KAY WILSON, JR.
319 Court Street
Muskogee, Oklahoma 74401

Attorney for Petitioner

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AUTHORITIES

Cases:

East Gadsden Bank v United States Fidelity and Guaranty Company, 415 F2d 357 (1969)
First National Bank and Trust Company, Chickasha, Oklahoma v The Continental Insurance Company, 510 F2d 7, (CCA 10 1975)
General Extrusions, Inc v American Surety Company of New York, 167 N.E.2d 367, Ohio 1959
Hindmarsh v Sulpho Saline Bath Co., (Nebraska 1922), 187 N.W. 806, 808, 108 Neb. 168
Kelleam v Maryland Casualty Co. of Baltimore Maryland, CCA Okla. 1940, 112 F2d 940
Twin City Fed. Sav. & Loan Ass'n v Transamerica Ins. Co., 413 F2d 494 (1969)

Constitutional Provisions:

Oklahoma Constitution, Article 2 §19

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28 U.S.C. § 2101 (c)
Oklahoma Statutes, Title 12 § 221

Rules of Court:

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO._____

R. C. ROBERTS,
Petitioner,

vs.

AMERICAN BANK OF MUSKOGEE
and HARTFORD ACCIDENT AND
INDEMNITY COMPANY, A
Corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

(a) The opinion of the United States Court of Appeals for the Tenth Circuit labeled by the court "NOT FOR ROUTINE PUBLICATION" appears at Appendix A, infra, pp. 1. The opinion of the United States District Court for the Eastern District of Oklahoma is unreported and appears at Appendix B, infra, pp. B1.

(b) The jurisdiction of this is invoked under 28 U.S.C. § 1254(1).

(i) The date of the judgment or decree sought to be reviewed is not shown other than by the filing stamp placed thereon by the Clerk of the United States Court of Appeals for the Tenth Circuit which is "July 26, 1976, Howard K. Phillips, Clerk, United States Court of Appeals Tenth Circuit". The date of its entry is presumed to be the date shown by the filing stamp to-wit, July 26, 1976.

(ii) There has been no order respecting a rehearing, and there has been no order granting an extension of time within which to petition for certiorari.

(iii) This petition for certiorari is filed less than 90 days from the date of the date of judgment and the time of its entry as required by 28 U.S.C. § 2101(c) 28 U.S.C. §1254(1) is relied upon to invoke the jurisdiction of this court.

(c) The questions presented for review are:

(i) Petitioner was denied trial by jury although request for trial by jury was filed on the same day and simultaneously with the last pleading filed by Petitioner, to-wit, a Motion for Severance.

(ii) Whether it is unjust to permit Plaintiff to have dual recovery by collection of $155,000 on the judgment against the bonding company and enforcement of bonding company's judgment in the amount of $145,794.53, plus interest, against the Petitioner by reason of an assignment from the bonding company to the bank.

(iii) Whether judgment of bonding company against Third-Party Defendant could be assigned by the Third-Party Plaintiff to Plaintiff during pendency of appeal by Third-Party Defendant.

(iv) Whether it is perversion of Third Party Practice to allow Plaintiff to have judgment against Third-Party Defendant with no diversity of citizenship and no federal question.

(v) Whether it was proper for trial judge to read discovery depositions prior to trial and thereafter not make same available for inclusion in the record on appeal.

(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, are hereinafter set out verbatim.

Oklahoma Constitution, Article 2, § 19:

"The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and crim-

inal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts and courts not of record, a jury shall consist of six men.***"

Rules of Civil Procedure, Rule 38(b) demand:

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

Rules of Civil Procedure, Rule 42(b):

"Separate Trials: The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

Title 12, Oklahoma Statutes § 221:

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this article but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract."

Rules of Civil Procedure, Rule 14(a):

"***Any party may move to strike the third-party claim or for its severance or separate trial.***"

(e) R. C. Roberts, a citizen of Oklahoma, was President, Chairman of the Board of Directors and one of the three shareholders who had controlling interest in the American Bank of Muskogee, an Oklahoma corporation, from November, 1971, until July, 1973. Hartford furnished the Bank a "Bankers Blanket Bond" to insure against losses "sustained at any time but discovered after noon on April 24, 1973".

The Complaint listed four borrowers from the bank whose notes the bank had been required to "charge off" because of delinquency at the time of the bank examiner's inspection of July, 1973. The four were Hassen, Keene, Bowen and Sigler. By the time of the Pre-Trial, the Keene and Sigler notes had been paid off.

There was diversity of citizenship between the bank and Hartford, but not between the bank and Roberts. No Third-Party Complaint was filed against Roberts. Roberts moved to dismiss on the ground of no diversity but was overruled October 24, 1974. On November 12, 1974, Roberts filed an Answer to the "Complaint, Cross-Complaint and Third Party Complaint". No Third-Party Complaint had been filed but the court in overruling Roberts' Motion to Dismiss had referred to Roberts as "Third Party Defendant" and had referred to Hartford as "Third Party Plaintiff". On November 27, 1974, Roberts filed DEMAND FOR JURY TRIAL AND MOTION FOR SEVERANCE AND SEPA-

RATE TRIAL. On January 6, 1975, the court filed an Order overruling Roberts' Motion for Severance and Separate Trial but was silent on the Demand for Jury Trial. At Pre-Trial on January 16, 1975, the Bank and Hartford were asked if they desired a jury and both announced that they did not. Then the court announced the Roberts' Demand for Jury Trial was untimely and that the case would be tried by the court. It was announced that it would take three days to try the case. In the meantime, on December 9, 10 and 11, 1974, Roberts had been tried and acquitted by a jury in the United States District Court for the Eastern District of Oklahoma in case No. 74-67-CR for the same alleged acts set forth in the civil complaint in connection with the Hassen loans. Roberts had not been charged with the crime in connection with the Bowen loans but Bowen had, and Bowen had been convicted by a jury with Judge Luther Bohanon presiding. The Bowen trial had been held October 21 and 22, 1974, in the United States District Court for the Eastern District of Oklahoma in case No. 74-68-CR. Bowen had assigned accounts receivable almost weekly to the Bank as security for loans of eighty per cent of the face value of each group of accounts assigned. Many of the accounts so assigned were never paid and Bowen was convicted for having misrepresented the value of the accounts as security for money borrowed from a bank insured by F.D.I.C. The evidence is undisputed that the last money loaned by the bank to Bowen or his corporation was on November 21, 1972. Bowen's notes

were made in the name of Kampus Kut-Ups and were on the agenda of numerous meetings of the Board of Directors of the Bank prior to the effective date of the Hartford policy. The disappointing pay-off experience of the Bowen loans and the discovery that some of the accounts assigned by security were worthless was made known to the Board as early as June, 1972. The Kampus Kut-Ups line of credit was completely stopped by action of the Board on November 21, 1972.

The Hassen loans were made December 12, 1972. Out of the proceeds of one of the Hassen loans, Roberts received two of the bank's Cashier's Checks, one in payment of a debt owned to Roberts by a corporation selling stock to Hassen, and one in payment of a distribution by the same corporation. The property purchased by Hassen from the corporation was stock in another corporation which had developed a prototype of a sports boat. There had been no concealment of the receipt of the funds by Roberts and the merits of the Hassen loans were the subject of several discussions by the Board members and bank officers in December, 1972, four months before the effective date of the Hartford policy. One of the bank directors, John Haworth, was the writing agent for Hartford, and he, along with Roberts, had been stockholders in the corporation selling assets to Hassen who was paying the purchase price with loan funds from the bank. The Hassen notes became due in February, 1973, and were on the agenda for a Board meet-

ing prior to Hartford's policy. Everything claimed as a loss under Hartford's policy was known by the bank officers and directors prior to the effective date of the policy, to-wit, April 24, 1973. Nothing was "discovered" in July, 1973, that was not known by the Directors of the bank prior to April 24, 1973. At the commencement of the trial, the court announced that it has read all the depositions in the file, some of which were discovery depositions and had irrelevant but inflamatory testimony concerning Roberts.

(f) Not applicable.

(g) Diversity of citizenship between the Plaintiff and Defendant and Federal Rule of Civil Procedure 14 for jurisdiction between third-party plaintiff and third-party defendant.

(h) (i) Petitioner's demand for jury trial was timely because it was filed within 10 days from Petitioner's last pleading, to-wit, Motion for Severance.

(ii) Despite the fact that two judgments may exist side by side, there is a limit to their independent existence. Both judgments in substance represented but a single claim. Irrespective of how many judgments the Plaintiff may have, satisfaction of one of them constitutes satisfaction of the other also. *Hindmarsh v Sulpho Saline Bath Co.*, (Nebraska 1922) 187 N.W. 806, 808, 108 Neb. 168.

(iii) The bonding company's judgment against Roberts for "dishonest acts" sounds in tort and is not assignable while on appeal.

(iv) By reason of the satisfaction of the judgment against the bonding company, it is now out of the case. The only parties left in the case are two citizens of Oklahoma with no federal question involved. The dealings between the Plaintiff and Defendant, to which the Petitioner was not a party, have resulted in a perversion of Third-Party Practice allowed under Rule 14 in that the bank is being allowed to collect its judgment twice.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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Muskogee, Oklahoma 74401

Counsel for Petitioner

October 11, 1976

APPENDIX

FILED
JUL 26 1976
HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

APPENDIX A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1577

AMERICAN BANK OF MUSKOGEE,
Appellee,

v.

HARTFORD ACCIDENT &
INDEMNITY COMPANY,
a Corporation,
Appellee,

v.

R. C. ROBERTS,
Appellant.

Appeal From The
United States District Court
For The Eastern District
of Oklahoma
(D.C. #74-195-C)

Gene Stipe, McAlester, Oklahoma (Kay Wilson, Jr., Muskogee, Oklahoma, on the Brief), for Appellant.

James C. Pinkerton, Tulsa, Oklahoma (Carl Pinkerton and Robert D. Frank, Tulsa, Oklahoma, with him on the Brief), for Appellees.

Before HILL and SETH, Circuit Judges, and TEMPLAR, United States District Judge.*

*Honorable George Templar, United States District Judge, District of Kansas, Sitting by Designation.

SETH, Circuit Judge.

American Bank of Muskogee sued Hartford Accident & Indemnity Company under the employee fidelity clause of a bankers blanket bond issued by Hartford to the bank. The complaint alleged that R. C. Roberts, the appellant, committed dishonest acts causing losses to the bank while acting as its President, Chairman of the Board, and Chief Executive Officer. Jurisdiction was based on diversity of citizenship.

Hartford filed a pleading called an "Answer and Cross Complaint" naming Roberts as "third party defendant" and claiming indemnification from him if liability on the bond was found. Roberts answered the third party complaint and seventeen days later filed a demand for trial by jury. The demand was denied as untimely, and the matter was tried to the court.

The court entered judgment for $145,794.53 in favor of the bank against Hartford, and for the same amount in favor of Hartford against appellant. R. C. Roberts has taken this appeal.

Roberts argues initially that the trial court was without jurisdiction because of a lack of diverse citizenship between him and the bank, since both were citizens ot Oklahoma. He cites no cases in support of the contention and it is without merit. The bank in the main action has no claim against appellant as a third party defendant. It is on the basis of Hartford's indemnification claim against him that he has been brought into the action. The claim by Hartford is within the jurisdiction of the trial court under Rule 14, Fed.R.Civ.P., and there is no need for an independent basis of jurisdiction as between the bank and

appellant. United States v. Acord, 209 F.2d 709 (10th Cir.); 3 Moore, Federal Practice 14.26 (2d ed. 1974).

Appellant's second procedural challenge is that he was improperly denied a jury trial. The record establishes that Roberts waived his right to trial by jury. He answered the third party complaint on November 12, 1974. He filed a demand for jury trial seventeen days later, on November 29, 1974. Rule 38(b), Fed.R.Civ.P., provides that demand for jury must be made no later than ten days after service of the last pleading which, in this case, was appellant's answer to the third party complaint. Failure to timely file the demand constitutes waiver, rule 38(d), Fed.R.Civ.P., and this court has so held. American Fidelity & Cas. Co. v. All American Bus Lines, 190 F.2d 234 (10th Cir.).

Hartford had furnished to the bank a bankers blanket bond in the usual form to insure against "loss through any dishonest or fraudulent acts of any employee" sustained at any time, but discovered after April 24, 1973. The bank filed a complaint against Hartford only on this fidelity clause, asserting that appellant committed dishonest and fraudulent actions in relation to four loans negotiated by him. Two of the claims were compromised or ratified by the bank and were dismissed. Trial centered on the Bowen and Hassen loans.

Bowen Loans:

During 1972, appellant made forty-two loans to Don Bowen, d/b/a Kampus Kutups, amounting to $113,334.00. The loans were purportedly secured by the assignment to the bank of Bowen's accounts receivable. Between January 10, 1972, and May 2, 1972, appellant made personal and accounts receivable loans of $30,275.00 to Bowen. Of this amount, with approximately $22,905.49 due and owing on

May 8, 1972, the bank suffered a loss of approximately $15,000.00. The trial court found these loans and losses were not the result of dishonesty. However, the court found that by May 8, 1972, appellant had knowledge that there were improprieties in the Bowen loans, and that abnormal losses would be suffered by the bank. (Findings Nos. 9 and 10). Bowen frequently overdrew his account and appellant approved the overdrafts. Collections from the accounts receivable were grossly inadequate, averaging about ten per cent of the amount loaned. Roberts had knowledge that deliveries on consignment, rather than outright sales, were being made.

Nevertheless, after May 8, 1972, appellant made an additional twenty-eight accounts receivable loans, totaling $83,059.00, and a $10,000.00 personal loan secured by property previously used as security in an earlier personal loan, and further secured by a third mortgage on Bowen's residence.

During the latter half of 1972, and specifically on July 24, 1972, appellant sent out letters of confirmation on the pledged accounts receivable. The vast majority of replies of the purported debtors denied sales to them and hence denied having accounts payable. Also a consolidation loan made by appellant was not presented to the board of directors as such loans normally were.

From May 8, 1972, until his resignation, appellant continually advised the board of directors that there were no difficulties with the loans. The trial court found that appellant was dishonest and fraudulent in leading the directors to believe in the value of the loans. (Finding No. 16).

On the loans made after May 8, 1972, the court found that the bank lost $73,087.77. Concluding that appellant had acted fraudulently in relation to the Bowen loans, the court entered judgment accordingly.

Hassen Loans:

In 1972, M. A. Hassen had become indebted to a Tulsa automobile dealership through the cashing of his checks by Mr. Elliott, an employee of the dealership. Mr. Elliott, previously known to appellant by the participation of Elliott, appellant, and others in a boat venture, presented Hassen to appellant as a purchaser of the boat venture.

Appellant made loans to Hassen totaling $80,299.82, $51,544.87 to pay the automobile dealership, and $28,754.95 to purchase the boat venture. The loans were made on the security of 400,000 shares of Kar-N stock which were practically worthless. Roberts did not investigate the value of the stock, and did not require Hassen to submit a financial statement of any kind to support the loan. Further, the record shows that appellant personally benefitted from the Hassen loans by repayment to him, out of the proceeds of the bank loan, of a personal loan he had made to the boat venture, and through receipt of a profit as his share of the proceeds from the sale of the boat venture.

The trial court found that in the Hassen loans, appellant concealed his personal gain from the board of directors in violation of state and federal law. It also found that appellant had breached the trust placed in him by the directors by making such an imprudent loan. Ascertaining the loss on the Hassen loans to be $73,703.76, the court entered judgment accordingly.

Roberts' first contention relates to criminal charges which arose out of these same transactions. Appellant was not charged with a crime in relation to the Bowen loans, but Bowen was charged and convicted of securing loans by fraudulent statements. Appellant was tried and acquitted by jury of bank fraud charges in relation to the Hassen loans. From these circumstances, appellant argues that Bowen's

conviction for securing loans by fraudulent statements insulates him from civil liability as the officer of the bank who made the loans. Additionally, he contends that his acquittal in relation to the Hassen loans was admissible in the civil case and is dispositve of his civil liability in relation to those loans. We cannot agree.

As to the Bowen loans, appellant ignores the fact that when he learned Bowen was falsifying the accounts receivable, he continued to advance monies while representing to the board that the loans were secure. In effect he participated in the deception which Bowen perpetrated on the bank. Bown's conviction in that regard should not relieve appellant of civil liability for his breach of trust. In relation to the Hassen loans, Oklahoma follows the traditional rule that evidence of acquittal in a criminal case is not admissible, much less dispositive, in a civil suit arising out of the same transactions. Goodwin v. Continental Casualty Co., 175 Okl. 469, 53 P.2d 241.

Appellant next contends that there was no concealment on his part in relation to the loans and that the board of directors was fully aware of the state of the loans at all material times. He also contends that any fraud or dishonesty was discovered prior to the effective date of the bond and, therefore, that the bond did not cover the losses incurred.

These arguments are challenges to the factual findings of the trial court. The court specifically found fraudulent concealment by the appellant in relation to the Bowen loans in Findings of Fact Nos. 13, 14 and 16; and as to the Hassen loans by Findings Nos. 18 and 25. While termed a conclusion of law, the court also found that appellant's fraudulent conduct was not discovered by the board of directors until a

bank examination on July 17, 1973, a date within the coverage of the bond. (Conclusion of Law No. 7).

This court has often held that the trial court's findings of fact will not be disturbed on appeal unless clearly erroneous. Sims Consolidated, Ltd. v. Irrigation & Power Equipment, Inc., 518 F.2d 413 (10th Cir.); Halliburton Co. v. Dow Chemical Co., 514 F.2d 377 (10th Cir.). The Findings are fully supported by the record, and we find no error.

The final contention by appellant relates to posttrial activity between the bank and Hartford. After entry of judgment in favor of the bank against Hartford, and in favor of Hartford against appellant, the bank and Hartford entered into settlement negotiations. Hartford agreed to pay the bank $155,000.00 in full settlement of its obligations to the bank under judgment, and to assign to the bank for $20,000.00 its judgment against Roberts. Therefore, the bank received from Hartford $135,000.00 plus Hartford's assignment of rights against appellant.

Roberts contends that the assignment is improper for two reasons. He intimates that the judgment is for tort damages and, as such, cannot be assigned. He also contends that the assignment results in a judgment for one Oklahoma citizen, the bank, against another Oklahoma citizen, himself, thereby perverting third party practice when diversity of citizenship is the sole basis for federal jurisdiction.

However, there is no merit in this position as appellant's liability stems from breach of his fiduciary duties to the bank, and is contractual in nature. Hughes v. Reed, 46 F.2d 435 (10th Cir.). Hartford's rights against appellant arose out of a contract, and may be assigned under Oklahoma law. Sampson v. Beeler & Bennett, 103 Okl. 229, 229 P. 777; Mc-

Farlin v. Adair, 46 Okl. 46, 148 P. 138. Further, the jurisdiction of the trial court as based upon proper diversity has already been discussed. Postjudgment settlement activity by the parties does not in any way affect the court's judgment.

AFFIRMED.

FILED
JUNE 12 1975
CHARLES N. HASKELL
CLERK, U.S. DISTRICT COURT
By GF
DEPUTY CLERK

APPENDIX B

No. 74-195-C

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA
AMERICAN BANK OF MUSKOGEE,
Plaintiff,

vs.

HARTFORD ACCIDENT & INDEMNITY
COMPANY, a corporation,
Defendant and Third
Party Plaintiff,

vs.

R. C. ROBERTS,
Third Party Defendant.

JUDGMENT

The Court has filed herein this day its Findings of Fact and Conclusions of Law and based thereon,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, American Bank of Muskogee, have and recover judgment of and from the defendant, Hartford Accident & Indemnity Company, in the amount of $145,794.53 together with interest thereon at the rate of 6 percent per annum from and after April 8, 1973, and interest on the principal and accrued interest at the rate of 10 percent per annum from and after the date of this Judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Hartford Accident & Indemnity Company, have and recover judgment of and from the third

party defendant, R. C. Roberts, in the amount of $145,794.53 together with interest thereon at the rate of 6 percent per annum from and after April 8, 1973, and interest on the principal and accrued interest at the rate of 10 percent per annum from and after the date of this Judgment until paid.

Dated this 12th day of June, 1975.

s/s LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

FILED
NOV 29 1974
CHARLES N. HASKELL
CLERK, U.S. DISTRICT COURT
By MM
DEPUTY CLERK

APPENDIX C

Civil Action

File No. 74-195-C

IN THE UNITED STATE DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

AMERICAN BANK OF MUSKOGEE,
Plaintiff,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Defendant and Third-Party Plaintiff,

vs.

R. C. ROBERTS,
Third-Party Defendant.

DEMAND FOR JURY TRIAL AND
MOTION FOR SEVERANCE AND SEPARATE TRIAL

Comes now R. C. Roberts, Third-Party Defendant, and demands trial by jury on all issues.

Third-Party Defendant moves for severance and separate trial.

s/s KAY WILSON, JR.
319 Court Street
Muskogee, Oklahoma 74401
Attorney for R. C. Roberts

CERTIFICATE OF SERVICE

On the 27th day of November, 1974, a true and correct copy of the foregoing Demand for Jury Trial and Motion for Severance and Separate Trial was mailed, postage prepaid, to Carl Pinkerton and James C. Pinkerton, Third Floor, Thurston National Building, 6 East Third Street, Tulsa, Oklahoma 74103, Bruce Green, P. O. Box 1373, Muskogee, Oklahoma 74401, and Clyde J. Watts, 219 Couch Drive, Oklahoma City, Oklahoma 73102, attorneys for American Bank of Muskogee and Hartford Accident and Indemnity Company respectively.

s/s KAY WILSON, JR.

FILED
JAN 6 1975
CHARLES N. HASKELL
CLERK, U.S. DISTRICT COURT
By PO
DEPUTY CLERK

APPENDIX D

No. 74-195-Civ.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

AMERICAN BANK OF MUSKOGEE,
Plaintiff,

vs.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,
Defendant and
Third Party Plaintiff,

vs.

R. C. ROBERTS,
Third Party Defendant.

ORDER

This cause comes on for consideration by the Court upon Motion of the Third Party Defendant, R. C. Roberts, for severance and separate trial.

The Court, having extensively and diligently reviewed the file in this case, including the pleadings, briefs of all parties, and other relevant law, concludes that the Motion for Severance and Separate Trial filed herein by R. C. Roberts, Third Party Defendant, should be, and the same is hereby overruled, and

IT IS SO ORDERED.

Dated this 6th day of January, 1975.

s/s LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

FILED
SEP 25 1975
CHARLES N. HASKELL
CLERK, U.S. DISTRICT COURT
By GF
DEPUTY CLERK

APPENDIX E

No. 74-195-C

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

AMERICAN BANK OF MUSKOGEE,
Plaintiff,

vs.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,
Defendant and
Third Party Plaintiff,

vs.

R. C. ROBERTS,
Third Party Defendant.

RELEASE AND SATISFACTION OF JUDGMENT AND ASSIGNMENT OF THIRD PARTY JUDGMENT

Plaintiff, American Bank of Muskogee, herein called "Bank," for and in consideration of the sum of $155,000.00 to it in hand paid by the defendant, Hartford Accident and Indemnity Company, herein called "Hartford," the receipt and sufficiency of which is hereby acknowledged, does hereby accept said sum of $155,000.00 in full and complete satisfaction of the judgment rendered in the above entitled cause on April 10, 1975, and entered on June 12, 1975, in favor of Bank and against Hartford, and does hereby release said judgment and the lien thereof.

Hartford, for and in consideration of the sum of $20,000.00 to it in hand paid by Bank, the receipt and sufficiency of which is hereby acknowledged, does hereby

grant, bargain, sell, convey, assign, set over and transfer unto said Bank the judgment rendered in favor of Hartford and against Third Party Defendant, R. C. Roberts, on April 10, 1975, in the sum of $145,794.53 together with interest and costs; provided, however, that both parties hereto recognize that Third Party Defendant has the right to appeal therefrom, and therefore, said assignment of judgment is without warranty or representation and without recourse of any kind and all further expense of prosecuting the third party complaint filed by Hartford against the Third Party Defendant in the Trial Court or upon appeal shall be borne by Bank.

Bank and Hartford agree, however, that the payment by Hartford to Bank and the Release and Satisfaction of Bank's judgment against Hartford and the payment by Bank to Hartford and the assignment of Hartford's claim and judgment against Third Party Defendant are final and shall not be modified or amended regardless of the disposition of the third party complaint or the judgment rendered thereon in the Trial Court, upon appeal, or by settlement between Bank and Third Party Defendant.

DATED this 30th day of June, 1975.

AMERICAN BANK OF MUSKOGEE

By s/s JOHN A. BAKER
President

HARTFORD ACCIDENT AND INDEMNITY
COMPANY

By s/s JAMES A. EVEN